

THE COMMITTEE FOR IDAHO'S HIGH DESERT ET AL.
CARL AND GLORIA OTTO

IBLA 95-465, 95-558

Decided October 30, 1998

Appeal from a Decision by the Owyhee (Idaho) Resource Area Manager, Bureau of Land Management, approving a mining plan of operations for the Stone Cabin Mine Project. IDI 29233.

Affirmed.

1. Environmental Quality: Environmental Statements–Mining Claims: Environment–Mining Claims: Plan of Operations–National Environmental Policy Act of 1969: Environmental Statements

A rule of reason applies when reviewing new information regarding a proposed action analyzed in a draft and a final EIS and considering whether a supplemental EIS is required. A decision to approve a mining plan of operations analyzed in both a draft EIS and a final EIS without preparation of a supplemental EIS will be affirmed when the information generated in preparation of the final EIS does not significantly vary from that considered in the draft EIS in either the nature or magnitude of the disclosed impacts.

2. Federal Land Policy and Management Act of 1976: Plan of Operations–Mining Claims: Plan of Operations

The surface management regulations at 43 C.F.R. Subpart 3809 implement the mandate of section 302(b) of the Federal Land Policy and Management Act of 1976 to manage the public lands to prevent unnecessary and undue degradation. Approval of a mining plan of operations will be upheld where the record indicates that BLM analyzed the plan of operations and prepared both a draft and a final EIS, and conditioned approval of the plan on the performance of measures reasonably anticipated to prevent any unnecessary or undue environmental degradation, as defined by Departmental regulation 43 C.F.R. § 3809.0-5(k).

APPEARANCES: Randy Morris, Boise, Idaho, for the Committee for Idaho's High Desert; Carolyn Brown, Ontario, Oregon, for the Concerned Citizens for Responsible Mining; Jim Wilson, Gridley, California, for the Legal and Safety Employer Research; Scott L. Campbell, Esq., Boise, Idaho, for Carl and Gloria Otto; Richard A. Dye, Vice President, for Kinross DeLamar Mining Co.; Kenneth M. Sebby, Esq., Office of the Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Committee for Idaho's High Desert, the Concerned Citizens for Responsible Mining, and the Legal and Safety Employer Research (IBLA 95-465) and Carl and Gloria Otto (IBLA 95-558) have filed appeals from an April 14, 1995, Record of Decision (ROD) by the Owyhee (Idaho) Resource Area Manager, Bureau of Land Management (BLM), approving a mining plan of operations, 1/ as amended, filed by Kinross DeLamar Mining Company (Kinross) for the Stone Cabin Mine Project, located on private, State, and Federal lands in the Owyhee Mountains in southwestern Idaho. The ROD, reached after preparation of a draft environmental impact statement (DEIS) and final EIS (FEIS) for the project, found that the plan, as amended, will not cause unnecessary or undue degradation of Federal lands. (ROD at 3.)

The Stone Cabin Mine is located on Florida Mountain, about 50 miles southwest of Boise, Idaho, and 20 miles east of Jordan Valley, Oregon. The mine is adjacent to the Kinross DeLamar Mine (KDM). Stone Cabin is to be operated by Kinross as a satellite operation of the KDM, which is an ongoing mining operation.

The ROD approved the plan of operations as amended by stipulations set forth in the ROD. The ROD incorporated by reference all design features, environmental controls, mitigation measures and monitoring set forth in the amended Plan and its Appendices, as well as a plan to mitigate impacts to wetlands, a Memorandum of Agreement among the Idaho Historic Preservation Officer, the Advisory Council on Historic Preservation, and BLM, and a plan to mitigate adverse effects to historic properties. 2/

1/ These appeals were consolidated by Order of this Board dated Aug. 1, 1996, along with another appeal of the ROD (IBLA 95-537) which was filed by the Silver City Water Board. This latter appeal was subsequently withdrawn by the appellant and dismissed by Order of this Board dated Sept. 6, 1996.

2/ The mine operation is subject to a number of authorizations pursuant to a variety of laws administered by other regulatory agencies including a National Pollution Discharge Elimination System (NPDES) permit issued by the Environmental Protection Agency (EPA) and a "section 404" permit issued by the U.S. Army Corps of Engineers (Corps) pursuant to the Clean Water Act (CWA), 33 U.S.C. § 1344 (1994). The EPA is responsible for authorizing discharges of wastewater associated with the project through issuance of a NPDES permit, and must comply with section 102 of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332 (1994), prior to final

The project approved by the ROD permits open-pit mining for gold and silver from three mine pits, with ore processing via conventional milling at the existing mine. The projected life of the mine is at least 7 years and may be as long as 30 years. It is expected to operate year-round and to employ about 45 people, in addition to the 121 persons employed by Kinross at the DeLamar Mine. Mining is planned in a large open pit located primarily on the western slope of Florida Mountain. Ore from the mine pit will be hauled by truck over a new 6-mile long haul road to the KDM, where it will be milled. Tailings will be deposited in the existing tailings dam at KDM; the existing mine would not, however, be enlarged. Rock having insufficient precious metal values to process via milling will be placed in mined rock disposal areas in nearby Rich Gulch and Jacobs Gulch, located adjacent or near to the haul road between the new and the existing mine. Mined rock will also be used to partially backfill depleted mine pits. Topsoil will be salvaged during construction of the pits, haul road, mined rock disposal areas, and other project components and used subsequently for reclamation. (ROD at 1; FEIS at S-2.)

The plan of operations for the Stone Cabin Mine project was initially submitted to BLM in August 1989 under the surface management regulations at 43 C.F.R. Subpart 3809. Upon review of the plan, BLM determined that approval of the plan would be a major Federal action that could significantly affect the quality of the human environment, and, hence, preparation of an EIS would be necessary prior to adjudicating the plan.

On October 19, 1989, a notice of intent to prepare an EIS ^{3/} for the plan of operations for the Stone Cabin Mine and an invitation to participate in issue identification for the EIS was published in the Federal

fn. 2 (continued)

action on a new source NPDES application (see 33 U.S.C. § 1371 (1994) and 40 C.F.R. § 122.29) in accordance with the CWA. 33 U.S.C. §§ 1251-1387 (1994). The Corps is responsible for issuance of a permit for the discharge of dredged or fill material into wetlands and waters pursuant to section 404 of the CWA. Pursuant to 43 C.F.R. § 3809.1-6(a)(5), the plan of operations must also comply with the requirements of section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f (1994), and section 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1994). See Asarco Inc., 141 IBLA 269 (1997).

The NPDES permit was issued by EPA on May 2, 1995; the Idaho Department of Water Resources approved construction of the Jacob's Gulch sediment retention structure on June 15, 1995; and the section 404 permit, which incorporated the "Plan to Mitigate Wetlands" (also incorporated in the ROD), was authorized by the Corps on June 30, 1995. (BLM Answer at 25-26.)

^{3/} Preparation of an EIS is generally required pursuant to section 102 of NEPA, 42 U.S.C. § 4332 (1994), when it is found that a proposed Federal action such as approval of a mine plan of operations may have a significant impact upon the human environment.

Register. Notice was sent to 419 interested persons, groups, or agencies a week later, and public scoping meetings were held in Boise, Idaho, and Jordan Valley, Oregon on November 7 and 8, 1989. (FEIS at S-1.)

In March 1991, BLM and the EPA published the DEIS for the proposed mining plan. (FEIS at S-1, 5-1.) On April 12, 1991, a Notice of Availability of DEIS was published in the Federal Register. The Notice indicated that the DEIS was available for review, and public comments would be accepted until May 28, 1991, with opportunity for oral comments to be presented on April 23 and 24, 1991. The DEIS was also mailed to 355 recipients on March 21, 1991, for review and comment. Forty-two individuals filed written comments, and oral comments were received from 12 persons.

The proposed action underwent changes after publication of the DEIS, based upon (1) agency directives to Kinross to develop and incorporate mitigation measures to reduce impacts below those indicated in the DEIS; (2) public and agency comments on the DEIS; (3) ongoing Kinross exploration and research; (4) mining industry research and (5) revised mining and ore processing techniques submitted by Kinross. (FEIS at 1-6 through 1-7.) After consultation with interested State and Federal agencies, the FEIS was published in August 1994. Public comments on the FEIS were allowed to be submitted by September 19, 1994.

Both the DEIS and the FEIS considered the plan of operations submitted by Kinross as the "preferred alternative." In both documents, the preferred alternative contemplates three primary mine pits located within the mine pit boundary area: the Main Trend Pit, the Stone Cabin Pit, and the Tip Top Pit. (FEIS at 2-4 and Fig. 2-1.) A haul road originating in the pit area proceeds in a southwesterly direction past the Jacobs Gulch and Rich Gulch waste rock disposal areas, then veers westerly towards the existing DeLamar Mine.

The DEIS considered four options in addition to the preferred alternative: the Conveyor Alternative, the Jacobs Gulch Alternative, the Rich Gulch Alternative, and a No Action Alternative. (DEIS at S-1.) As reviewed by the DEIS, the proposed plan entailed a heap leach pad between the KDM mine and Florida Mountain, west of the Jacobs Gulch Waste Rock Disposal area with movement of low grade ore from the mine pits to the pad via truck or conveyor. See DEIS at 2-24. After publication of the DEIS and receipt of public comments, Kinross withdrew the plan for the heap leaching operation. It was deemed unnecessary, therefore, to weigh the environmental impacts of either the heap leach process or the conveyor alternative in the FEIS. (FEIS at 1-6 through 1-7.)

The FEIS considered the proposed action and the three remaining alternatives — the Jacobs Gulch, the Rich Gulch, and the No Action alternative. The Jacobs Gulch and Rich Gulch alternatives pertain to the proposed location of the waste rock disposal area and alter the plan of operations only in that respect. The Jacobs Gulch alternative describes an enlarged

mined rock disposal area at the northernmost of the two disposal areas and proposes elimination of the Rich Gulch disposal area; the Rich Gulch alternative would eliminate the Jacobs Gulch waste area and expand the southernmost disposal area.

Consisting of nearly 800 pages of information and analysis, the FEIS also includes 15 appendices which provide data to support the conclusions reached. Additionally, a "Plan to Mitigate Adverse Effects to Historic Properties" was published separately prior to issuance of the ROD. The FEIS includes a summary and introduction discussing the project location and describing the project; a statement of the purpose and need for the action; a description of the environmental analysis process; a description of the alternatives proposed, including changes in the project which resulted from agency and public input during the environmental analysis process, a description of the affected environment, an analysis of the environmental consequences of the proposed action and the alternative placement of the waste rock disposal areas, and a cumulative impacts analysis.

The FEIS analyzes the plan of operations for the Stone Cabin Mine as it existed at the time the FEIS was prepared, and the two alternatives for waste rock disposal, as well as the no-action alternative. Brief descriptions of alternatives considered but rejected were included, with the reasons for their rejection. The FEIS provides a summary comparison of the environmental impacts of the four alternatives at Table 2-13. Extensive discussion of the impact of each alternative on the affected environment is presented, including the impact of the project on soils, surface water, groundwater, the aquatic environment, vegetation, wildlife, cultural resources, recreation, grazing, the Silver City water supply, air quality, scenic quality, the town of Silver City, social and economic conditions, and energy use. For each aspect of the affected environment, the FEIS analyzes in detail the short-term and long-term impacts, and draws appropriate conclusions. The FEIS contains extensive discussion of mitigation and monitoring measures, a discussion of public participation and involvement, and comment letters on the DEIS and BLM's responses are included at Appendices K and L. A separate discussion of the impacts of the no-action alternative is also included.

Appellants in IBLA 95-465 have filed a statement of reasons for appeal (SOR) challenging the ROD on several grounds. First, it is asserted that the FEIS describes environmentally significant changes in project design which were not addressed in the DEIS denying reviewers the opportunity to comment on the proposal. Several letters referring to the need for changes in the EIS as well as a list of studies that produced new information about the environmental impacts of the project are cited. Appellants contend that design changes can affect environmental concerns and, hence, a supplemental DEIS is required in such a case. Appellants acknowledge that BLM published the FEIS and allowed the public to comment on that document prior to issuing the ROD in this case, but contend that this does not obviate the need for a supplemental EIS.

Further, Appellants contend that the FEIS inadequately addressed the indirect effects of the action resulting in incomplete and inconsistent mitigation measures. Specifically, Appellants question the effectiveness of measures incorporated to control acid mine drainage including encapsulation of potential acid forming rock and use of lime, limestone, and clay caps or linings. It is also contended that mitigation fails to address the long-term stability of the pit wall. Further, Appellants contend that backfilling of the mine pit with sulfide materials may lead to acid mine drainage and cause unnecessary and undue degradation of the public lands. ^{4/} Appellants challenge the wetlands mitigation plan as inadequate, noting that the plan to monitor sediments for mercury was dropped.

Additionally, Appellants argue that aspects of the preferred alternative were not analyzed in detail as required, noting the risk of mercury contamination and that collection pond water or treated water which meets NPDES permit conditions would be released to Jordan Creek. Further, Appellants contend that the plan lacks an effective means of controlling selenium levels and mitigating that impact. Appellants also assert that important information is missing from the FEIS, including a reasonable analysis of the groundwater hydrology, the air quality impacts resulting from the existence of crystalline silica in the exposed rocks, and the magnitude of anticipated precipitation events. Further, Appellants contend that impacts to cultural/historic resources have been inadequately studied.

Appellants have also challenged the adequacy of the FEIS for failure to address all cumulative impacts. Specifically cited are the impacts to surface water and groundwater of acid mine drainage from the waste dumps on the adjacent KDM mine. Appellants also cite the impact of the proposed Grassy Mountain gold mine in southeast Oregon.

Appellants Carl and Gloria Otto (IBLA 95-558) have also appealed the ROD on the ground that operation of the Stone Cabin Mine will adversely impact the Silver City and nearby private water supplies. Asserting that the mine operator and the Silver City water users do not have an agreement that will ensure the integrity of their water supplies, they challenge the FEIS on the ground that it does not adequately address this issue. Further, they contend that the operation which is the subject of the plan of operations will entail unnecessary and undue degradation to the water supplies.

An answer to the SOR has been filed on behalf of BLM. While BLM concedes that the need for changes in the project and the resulting analysis was disclosed as a result of the DEIS, it is asserted by BLM that these

^{4/} Section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (1994), as applied specifically by 43 C.F.R. § 3809.0-1 to operations authorized by the mining laws, dictates that, in managing the public lands, the Department shall "take any action necessary to prevent unnecessary or undue degradation of the lands."

changes do not constitute a violation of NEPA. Changes reflected in the FEIS as a result of regulatory agency directives to incorporate measures to mitigate impacts, ongoing research, and comments by the public and by regulatory agencies are contended by BLM to be consistent with the objective of responding to comments on a DEIS in preparing an FEIS, citing 40 C.F.R. § 1503.4(a). The FEIS did not address any issues or impacts which were beyond the scope of those considered in the DEIS, BLM asserts.

With respect to indirect effects in general and State regulatory concerns regarding acid mine drainage in particular, BLM explains that the reclamation plan for the mine was approved, subject to stipulations, by the Idaho Department of Lands on January 27, 1995. ^{5/} It is pointed out by BLM that acid mine drainage control is discussed and analyzed in the FEIS at pp. 2-23 through 2-24, 4-8 through 4-9, and 4-22. Further, BLM indicates that the preferred methods for control of acid mine drainage include selective handling and encapsulation of potential acid forming rocks within nonreactive materials to minimize contact with oxygen and water; minimizing seepage of water through potentially reactive rock materials by drainage diversion, regrading to promote surface runoff, and revegetation of soil cover or low permeability clay caps to minimize infiltration; and blending of alkaline and potentially acid-forming waste to neutralize any acid potential. (FEIS at 2-19.) Addition of base amendments such as lime could be implemented if needed to support control of acid mine drainage. *Id.* at 2-20.

Regarding the issue of selenium levels, BLM points out that selenium is one of the chemical constituents discussed in the surface water, groundwater, aquatic environment, and air quality sections of the FEIS. Thus, we note that, at Chapter 4, the discussion of potential impacts to surface waters from discharges containing selenium, along with other minerals, is discussed. (FEIS at 4-7 through 4-17, Appendix C at Table C-17.)

With respect to the long-term stability of the pit wall, BLM denies that this is an issue. Thus, BLM notes that some slumping of pit walls above the backfill level is inevitable as a stable ground surface at a natural angle of repose evolves. ^{6/}

In response to the assertion of unnecessary and undue degradation associated with inclusion of sulfide rock materials in waste rock to be placed in pits as part of the reclamation process, BLM points out that the FEIS addresses the effective isolation of potentially acid-forming waste to preclude acid mine drainage. Any sulfide materials used in back filling

^{5/} The same document deemed to be a reclamation plan required to be filed under State law constitutes the plan of operations filed with BLM under the surface management regulations at 43 C.F.R. Subpart 3809.

^{6/} The FEIS notes that mine pits will be backfilled to the level where exposed high walls "generally consist of oxidized materials." (FEIS at 2-4.)

mine pits, BLM notes, would be handled like sulfide waste in mined rock disposal areas, including selective handling and encapsulation, control of water runoff, and blending with alkaline materials to reduce acid generation potential. See FEIS at pp. 2-4, 2-8, 2-9, 4-21 through 4-22, and 4-27 through 4-28. Thus, BLM contends that there will be no unnecessary and undue degradation of the public lands. In response to the concern regarding monitoring for mercury, BLM points out that a substantial water quality monitoring program is provided for in the FEIS. (FEIS at 2-53 through 2-61 and Appendix J.)

With respect to groundwater impacts, BLM contends that the FEIS has presented an adequate analysis of the impacts, recognizing potential disruptions in flow, in Chapters 3 and 4. It is also noted by BLM that impacts to the Silver City water supply resulting from groundwater disruption caused by mining are addressed in the FEIS. (FEIS at 4-69 through 4-72.) In particular, impacts on the Silver City water supply and nearby private supplies will be mitigated by the mine operator by provision of water from an alternate source. Id. at 4-70. Regarding cumulative impacts resulting from approval of the plan of operations, it is pointed out by BLM that these are addressed in the FEIS at pp. 4-170 through 4-177.

An answer has also been filed by Kinross. With respect to the assertion of a need for a supplemental EIS, it is pointed out that changes in the FEIS were generally in response to input received in the process which resulted in measures to further mitigate impacts. Kinross notes that impacts to groundwater and surface water were addressed in the FEIS: "A full impact analysis for surface waters was evaluated on pages 4-8 through 4-17 and a full impact analysis for groundwater was evaluated on pages 4-23 through 4-30." Kinross also disputes Appellants' assertion that the plan to prevent acid mine drainage is incomplete or inconsistent.

Two fundamental issues are raised by these appeals. The first is whether the record before the Board discloses impacts significantly different from those analyzed in the DEIS or the FEIS so as to require preparation of a supplemental EIS. A related issue is whether the record reveals impacts from the plan of operations which constitute unnecessary and undue degradation of the public lands.

[1] Regulations promulgated by the Council on Environmental Quality require agencies to "prepare supplements to either draft or final environmental impact statements if * * * [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). A decision whether to prepare a supplemental EIS turns on whether the new circumstances or information "presents a picture of the likely environmental consequences associated with the proposed action not envisioned by the original EIS." Wisconsin v. Weinberger, 745 F.2d 412, 418, 420-21 (7th Cir. 1984). A supplemental EIS need not be prepared unless the new circumstances or information "provides a seriously different picture of the environmental landscape such that another hard look is necessary." Id.; see 40 C.F.R. § 1508.27, Louisiana Wildlife Federation v. York, 761 F.2d

1044, 1051 (5th Cir. 1985). In Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374 (1989), the Court held that agencies must apply a rule of reason when evaluating new information and determining whether to prepare a supplemental EIS: "[I]f the new information is sufficient to show that the remaining action will 'affect[t] the quality of the human environment' in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared." See Headwaters, Inc., 101 IBLA 234, 239-40 (1988).

While Appellants have noted changes in the project design from the DEIS to the FEIS, it appears from the record that changes were made in order to reduce or mitigate potential environmental impacts. Modification of a proposed action to mitigate adverse impacts during the environmental review process is consistent with a purpose of NEPA that consideration of environmental impacts be used as an aid to decisionmaking. 42 U.S.C. § 4331(b) (1994); see Building and Construction Trades Council of Northern Nevada, 139 IBLA 115, 118 (1997). Upon review of the record in light of the deficiencies asserted by Appellants, we find that they have failed to establish impacts significantly different in the nature or magnitude of the impact than those analyzed in the DEIS and FEIS which would dictate preparation of a supplemental EIS. See Wyoming Independent Producers Association, 133 IBLA 65 (1995).

[2] The remaining issue before us is whether approval of the plan of operations will cause "unnecessary or undue degradation of the public lands," in violation of section 302(b) of FLPMA. 43 U.S.C. § 1732(b) (1994). The surface management regulations promulgated thereunder define "unnecessary or undue degradation" to mean:

surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations. * * * Failure to comply with applicable environmental protection statutes and regulations thereunder will constitute unnecessary or undue degradation.

43 C.F.R. § 3809.0-5(k); see 43 C.F.R. § 3809.2-2; Island Mountain Protectors, 144 IBLA 168, 202 (1998); Charles S. Stoll, 137 IBLA 116, 125 (1996). Like NEPA, the definition requires BLM to consider the nature and extent of surface disturbances resulting from a proposed operation and environmental impacts on resources and lands outside the area of operations. Kendall's Concerned Area Residents, 129 IBLA 130, 140-41 (1994); Nez Perce Tribal Executive Committee, 120 IBLA 34, 36 (1991); see Sierra Club v. Hodel, 848 F.2d 1068, 1091 (10th Cir. 1988). This standard requires BLM to consider the extent of surface disturbance and the effects on resources and land uses both within and outside the area of operations in comparison to similar operations. Kendall's Concerned Area Residents, *supra*, at 140.

While NEPA review suggests that some environmental degradation will likely result from mining activities at Stone Cabin, Appellants have not shown that "surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character" will occur. Nor have Appellants shown that BLM has failed to comply with applicable environmental protection statutes and regulations.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur.

Gail M. Frazier
Administrative Judge

